United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

NORMANDY MANUFACTURING CORP., L. CLAUSE, S.A., COMPAGNIE D'ASSURANCES LA NEUCHATELOISE, S.A. HANSSEN AND CO., JAGENBERG OF CANADA, BILTMORE HATS, LTD., P.I.E. TRANSPORT, INSURANCE COMPANY OF NORTH AMERICA, COMPAGNIE D'ASSURANCES LA PATERNELLE, THE AMERICAN IMPORT COMPANY, SOCIETE DE PRODUITS CHIMIQUES INDUSTRIELS, COMPAGNIE D'ASSURANCES LES ASSURANCES NATIONALES I.A.R.D., T. RIVOIRE AND FILS, ALLIANZ S.A., S'ASSURANCES, ADIDAS S.A.R.L., THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY LIMITED, MICHELAN AND CO., PHILIPPE MARTIN ASSUREUR MARITIME, ALSTHOM-SAVOISIENNE, COMPAGNIE D'ASSURANCES LA C.A.M.A.T., CIE HELVETIA SAINT GALL, L'ITALIA, COMPAGNIE AUX DE PARFUMES INC., SIMMONS LIMITED, QUEBEC LIQUOR CORPORATION, HEINRICH EQUIPMENT CORP., DIVISION OF C.T.S. SALES, INC., FIREMAN'S FUND AMERICAN INSURANCE COMPANY, THE HOME INSURANCE COMPANY, TELEFONAKTIEBOLAGET L. M. ERICSSON, SJOFORSAKRINGSAKTIEBOLAGET HANSA, WALDER AND ZANGER INC. and PITT and SCOTT,

Plaintiffs-Appellants,

against

ATLANTIC CONTAINER LINE LTD. and CIE GENERALE TRANSATLANTIQUE, SWEDISH AMERICAN LINES and WALLENIUS LINES, d/b/a CARE LINE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

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Appellees' Factual Inaccuracies:

Since this is in reply to Appellees' brief we find no support in the record for the statement on page 3 there that "ACL had no knowledge of the operator's stowage practices". Quite to the contrary, Captain Franberg of ACL testified Captain Goby's practices were "in the same manner" as his own. (A 43) Furthermore, Captain Goby was in charge of stowage of Care Line vessels over all Care Line port agents and was himself the terminal manager in LeHavre for ACL and the terminal manager in LeHavre for Care Line. (A 50) He reported directly to Capt. Jauny-Gervais who is General Agent and the man in charge of all bookings for both ACL and Care Line. (A 50) Furthermore, Goby was chosen for his Care Line duties by an alternate member of the Board of Directors of ACL, Mr. Mirobent. (A 26)

Reference to page 8/9 of the Appellees' brief contains curious language suggesting that "it is not disputed . . . that Care Line was not a managing agent of ACL." We have been arguing throughout this litigation that Care Line is a managing agent in that ACL delegated all their carrier functions to Care Line upon delivery of the cargo to the terminal gate at the loading port (See Relationship Between ACL and Care, Appellants' Brief, p. 6). See also Plaintiffs' Amended Statement Under S.D.N.Y. Rule 9 (g) taking issue with ACL's disclaimer "on the basis of the Care Line activities and non-activities being imputed to ACL as managing agents." (A 11)

If ACL did not hire Care Line as managing Agents with regard to cargo booked on the Care Line they have not explained

1. the non-performance by Captain Franberg of the duty owed to cargo under ACL bills of lading of *mak-*

ing sure stowage was proper on the entire vessel (A 37, 39).

2. the agreed interpretation of the memorandum of understanding whereby ACL and Care Line assumed the relationship of shipper and carrier under a Care Line form bill of lading (although none was formally issued). (A 86) Doesn't this mean that whatever power ACL had over appellants' cargo under the ACL bill of lading, ACL was giving that power to Care Line under the Care Line bill of lading?

POINT I

The cases relied on by ACL in its brief do not support the proposition for which they have been cited.

A quotation out of context from Mr. Justice Brandeis in *Earle & Stoddard, Inc.* v. *Ellerman's Wilson Line, Ltd.*, 287 U.S. 420, 427 is claimed by appellees as the cornerstone of its exemption from liability for fire. Mr. Justice Brandeis did not say that breach by a managing agent of "what in other connections is held to be a non-delegable duty" does not impose liability on a carrier for damage to cargo by fire as appellees would have this Court infer. See Thede, Statutory Limitations (Other than Harter and Cogsa) of Carrier's Liability to Cargo-Limitation of Liability and the Fire Statute, 45 Tulane L. Rev. 959, 984.

A reading of the District Court decision in *Earle & Stoddard, Inc.*, 45 F (2d) 231, states "the immediate cause of the fire was the gross negligence of the ship's chief engineer . . . ." (232) The neglect was further described as "an act of operation or management of the ship which would be naturally left to its officer" (235).

Since negligence by a shore representative of the owner was specifically found lacking—while present in the Mont Laurier fire—the case does not help appellee.

Conversely in *Arkell & Douglas, Inc.* v. *United States* (2d Cir. 1926), 13 F. (2d) 555, this Court found the ship's engineer brought a dangerous condition to the attention of the ship's agent. "There is no doubt that the managing and operating agent of the Mallory Transport Lines had knowledge. * * * Knowledge or privity of managing officers or agents is the knowledge or privity of the corporation". [citations omitted]

Since in this case Mallory notified its principals so as to establish the knowledge of the higher representatives of the owners, appellees are asking this Court to conclude the resulting denial of the fire exemption would not have otherwise occurred. In view of the language quoted above this suggestion is untenable.

In *Consumers Import Co.* v. *Kabushiki Kaisha,* 320 U.S. 249 (1943), Mr. Justice Jackson delivering the opinion of the court footnotes the *Earle & Stoddard* case "6" for the proposition,

> "Since 'neglect of the owner' means his personal negligence, or in case of a corporate owner, negligence of its managing officers and agents as distinguished from that of the master or subordinates,[6] the findings below take the case out of the only exception provided by statute."

This Court in *Asbestos Corp.* v. *Compagnie de Navigation Fraissenet,* (2d Cir. 1973), 480 F. 2d 669, affirmed The Marquette was unseaworthy and Judge Levet's well reasoned opinion, 345 F. Supp. 814 (S.D.N.Y. 1972) rejecting the fire statute defense. Judge Levet citing *Consumers Import Co., supra,* and *Arkell & Douglas, Inc., supra* said:

> "However, courts have found that fault of managing agents to whom the corporation delegates the task of inspection, decision on precautions, and the like is the fault of the owner." See *Gilmore & Black, The Law of Admiralty, Second Edition,* p. 161, footnote 62.

Appellants have never contended stevedore negligence was of the managerial level as to vitiate the fire exemption granted in *The Ocean Liberty,* 199 F. 2d 134.

Reliance by appellee in *Petition of Skibs A/S Jolund (The Black Gull),* 250 F. 2d 777 (1957), 269 F. 2d 68 (1959), 273 F. 2d 61 (1959) is substantially misplaced as the history of the case shows. In this case there was no general agency type relationship between the time charterer and the shipowner involving a delegation of duties such as found in the memorandum of understanding. (A 62)

That negligence of supervisory or managerial personnel of a corporate managing agent defeats the fire exemption claimed by a carrier is clearly illustrated in *Gesellschaft Fur Getreidehandel A.G., Et Al., Hugo Mathes & Schurr KG.* v. *SS Texas, etc.* (E.D. La. 1970), 318 F. Supp. 599. In that case the knowledge and failure to act was that of an Assistant Manager. His employer Strachan Shipping Company "had sufficient authority so that its neglect or fault was the neglect or fault of defendant," and thus Swedish American Line lost the exemption of the fire statute.

Appellees again refer to *Great Atlantic and Pacific Tea Co.* v. *Lloyd Brasileiro* (The Pocono) (2d Cir. 1947) 159 F. 2d 661, 664, Appellants' Brief, pp. 18, 20:

In this case the traffic manager Zumsteg, of the owners general agent sent a man under him, Borges, designated a "port engineer" on board the ship and the master told him of a small fire in the bunkers. The Trial Court found Zumsteg and Borges justified in believing the fire was under control.

Judge Learned Hand wrote for this Court:

> "We agree therefore with the judge that the master was negligent; and it is also true, as he held, that the

owner is not liable for that negligence without more: that is, not unless it was shared by someone higher in authority. Borges's negligence will do, for to him was deputed supervision over the condition of ships as they came in, and of any repairs they might need, and his word was final about such matters as what was necessary to their proper care in port. The fact that Zumsteg was over him does not mean that he was not himself near enough to the top to charge the owner. The test is the same as is the test of 'privity or knowledge' under the Limitation Section (sec. 183, Title 46, U.S. Code). While it is seldom if ever that one situation exactly matches with another, we have frequently decided that the negligence of persons no nearer the actual governing officials than Borges should be imputed to corporate owners.

"We charge Borges with all that the master knew, not because the master knew it, but because it was his duty from what the master told him and what he saw, not to accept the master's assumption that all was well, but to push inquiries home, to cross-examine the master, to examine the engine room logs, and in general to bestir himself until he had all the information that anyone on board had. As in all such cases, the measure of the duty imposed depends upon the cost or difficulty of the precaution, compared with the hazard and the interest at stake. Borges was charged with providing for the safety of a cargo worth over half a million dollars; the necessary precautions were no more than to extract from those on board whatever they knew; and not to treat the fire as a matter on which another's judgment might be conclusive."

* * *

"The measure in such cases is not what the owner knows, but what he is charged with finding out. He may, if he will, put his ship at hazard and answer as

> he can to his underwriters, but to the cargo he must not be indifferent; he is relieved of his absolute liability at common-law only upon condition that he exercises care measured by the occasion. For these reasons we cannot agree that Borges was any less slack or careless than the master.
>
> "This runs counter to one of the findings of fact, so named; but a finding of negligence is not a finding of fact which must be 'clearly erroneous' to be subject to review. It sets a standard of conduct, which while it is applicable only to the concrete situation, involves a choice between, and an appraisal of, two contrasted values—the needed precaution and the possible damage. It is true that, when the wrong is not deliberate, the occurrence of the loss or damage by hypothesis involves a factor of probability and it may be argued that probability is a question of fact. Even so, after the damage has been discounted by the risk, the decision involves a comparison of the contrasted values: the necessary precautions and the stake; and that in turn demands the setting of a standard, a norm, an imperative, which is the usual hallmark of a jural act." (665)

The reason for citing these last two cases is the radical statements in the concluding paragraph of appellees' brief Point I requiring correction of the factual connotation of the argument.

Failure of an employee of an agent to act will cost the principal the fire exemption where he is of supervisory status and he is negligent for not meeting the obligation of what he is charged with finding out. This certainly fits Captain Goby of Care Line and Captain Franberg of ACL who had the duty to prevent stowage of incompatible cargo under ACL bills of lading except where this duty was delegated to managing agents. Negligence by a manage-

rial person in a corporation delegated to perform a carrier's duties has been shown to defeat the fire statute or fire exemption and stating the contrary is a well recognized legal principle doesn't make it so.

Finally on this point appellants wish to bring to the Court's attention pertinent quotations from *45 Tulane Law Review 959* (1971) referred to in *Gilmore & Black* which in effect summarize the law which appellees for the most part deny.

> ". . . privity is construed as some fault or negligent act on the part of the owner. Knowledge on the other hand, involves the owner's failure to take appropriate action to prevent loss or damage where he knows or should know that such action is necessary."
>
> * * *
>
> "Limitation will also be denied where the owner fails to exercise proper diligence when he has the duty to act. The owner will not be allowed to limit his liability resulting from unseaworthiness of the vessel if he has neglected to exercise proper diligence to make the vessel seaworthy."
>
> * * *
>
> "Even where . . . delegation is permitted [the owner] is required to exercise some degree of supervision and 'follow up' to insure the delegated responsibilities are carried out."
>
> * * *
>
> "The shipowner's duties for purpose of the fire statute are identical to those previously discussed with regard to limitation"
>
> * * *
>
> "Where the fire statute is involved, the cases uniformly hold that the owner *can* delegate to others the actual performance of his duties, including the inspections, repairs and other tasks that must be exercised to

insure the seaworthiness of the vessel. If the owner has exercised reasonable care to select a competent delegatee, he will not be deprived of the fire defense *unless the negligent delagatee is a managing agent or supervisory employee*" (italics added)

POINT II

Appellees have not answered appellants' argument that *forum non conveniens* is not applicable.

Plaintiffs' District Court Memorandum in opposition to the Care Line *forum non conveniens* motion was based on the "strong policy favoring litigation of relating claims in the same tribunal . . ." and that Care Line had not met the burden of showing prejudice.

Subsequent to the order of Judge Knapp dated September 27, 1974, when the matter came on for reconsideration, plaintiffs' affidavit in opposition to defendants' motion dated March 8, 1976, by attorney Mulroy stated:

> "The Court determined that the Care Line motion based on *forum non conveniens* would be dependent on the outcome of ACL's summary judgment motion when the order of discovery has been completed." Record 30.

Plaintiffs then went on to state the same opposition in Point VIII p. 59 of their Memorandum submitted on March 8, 1976, as was made prior to the order of September 27, 1974, which provides:

> "Since all parties agree that defendant Care Line's motion to dismiss on grounds of *forum non conveniens* should be dependent on the outcome of ACL's summary judgment motion, the Court will also defer action on that motion until the ordered discovery is completed." Record 29.

The marked reticence of appellees in not coming out and alleging that appellants stipulated, admitted or agreed that should the ACL motion for summary judgment be granted they would accept a similar fate on the Care Line motion for dismissal on *forum non conveniens* speaks volumes. They would have this Court extrapolate the District Court's language to find a waiver where none has ever existed.

The language chosen by the District Court to express the *understanding* that it was not going to decide the *forum non conveniens* motion until it decided the ACL motion should not be a bar to this Court's review of the point.

Yet, appellees' brief asserts at page 9 "there is no reason to retain the suit against Care Line defendants here" ignoring the forum selection clause of the bill of lading (A 83) deeming sub-carriers or agents of ACL "to be parties to the contract evidenced by this bill of lading" by Clause 6 and the "option of the Merchant" for the Southern District of New York in accordance with the laws of the United States.

These forum selection clauses have been honored since *M/S Bremen and Unterweser Rederei G.M.B.H.* v. *Zapata Off-Shore Company,* 407 U.S. 1, 92 S. Ct. 1907, 1972 A.M.C. 1407. See also *Roach* v. *Hapag-Lloyd,* 358 F. Supp. 481, 1973 A.M.C. 481 (N.D. Calif., 1973).

Care Line is bound by the ACL bill of lading. *Gans S.S. Line* v. *Wilhelmsen et al., The Themis,* (2d Cir. 1921), 275 F. 254, 262; *The Capitaine Faure,* (2d Cir. 1926), 10 F. (2d) 950, 966/967.

POINT III

Plaintiffs' motion for summary judgment should be granted.

There is no evidence whatever adduced in opposition to plaintiffs' motion other than counsel's claiming he disputes it. Yet appellees open Point I of their brief:

> "The parties are in agreement that there is no 'genuine issue as to any material fact' ".

CONCLUSION

The order below should be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NORMANDY MANUFACTURING CORP., et al.,

Plaintiffs-Appellants,

against

ATLANTIC CONTAINER LINE LTD., et al.,

Defendants-Appellees.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN, being duly sworn, deposes and says that he is over the age of 18 years. That on the 21st day of September, 1976, he served two copies of Reply Brief for Appellants on Haight, Gardner, Poor & Havens, Esqs., the attorneys for Defendants-Appellees by delivering to and leaving same with a proper person in charge of their office at One State Street Plaza in the Borough of Manhattan, City of New York, between the usual business hours of said day.

Irving Lightman

Sworn to before me this
21st day of September, 1976.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978